

NOT FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

RHEA DOWLING,

Plaintiff,

v.

ANTHONY CRANE INTERNATIONAL,  
HESS OIL VIRGIN ISLANDS CORP.  
and AMERADA HESS,

Defendants

CIVIL NO. 1998/127

TO: Lee J. Rohn, Esq.  
Beth Moss, Esq.

ORDER GRANTING ANTHONY CRANE'S MOTIONS TO  
STAY AND TO COMPEL ARBITRATION

THIS MATTER came for consideration on Anthony Crane International's (Anthony Crane) Motion to Stay this matter pursuant to 9 U.S.C.A. § 3. Plaintiff filed a response in opposition to the motion and Anthony Crane filed its reply to such opposition. Anthony Crane then also filed its Motion to Compel Arbitration which is an adjunct to the prior motion and requires no further response.

By Order entered on May 6, 1998, in *Alexander & Freeman v. Anthony International, L.P.*, D.Ct. STX Civ. 1997/58, the Court found that the arbitration provision included in Anthony Crane's

employment contract was valid and enforceable.<sup>1</sup> On October 14, 1999, a similar Order was entered in *Guadalupe v. Anthony International, L.P., STX*, Civil 1998/103.<sup>2</sup> Such Orders are incorporated herein by reference. See also *Charles v. Virgin Islands Service Co.* 1999 WL 176035 (D.V.I.).

In this matter, Plaintiff contends that the facts herein are distinguishable from *Freeman* and that additional arguments are made that were not considered in *Freeman*.

I. Waiver

Plaintiff asserts that Anthony Crane has been derelict in commencement of the arbitration process and has thus waived the right to compel arbitration. Plaintiff cites paragraph 15 of the subject employment agreement which provide in relevant part as follows:

Within fifteen (5) calendar days of receipt of timely notice from an employee the company shall submit a request to the Federal Mediation and Conciliation Service of the American Arbitration Association to furnish a list of five impartial arbitrators.

Plaintiff maintains that Anthony Crane failed to comply with such provision.

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1. Plaintiff's attorney represented the Plaintiffs in that matter. The Complaint alleged wrongful termination and discrimination.

2. Plaintiff's attorney also represented the Plaintiff in that matter which also concerned employment discrimination.

Consistent with the strong preference for arbitration in federal courts, waiver 'is not to be lightly inferred,' and waiver will normally be found 'only where the demand for arbitration came long after the suit commenced and when both parties have engaged in extensive discovery.'

*Paine Webber, Inc. v. Faragalli*, 61 F.3d 1063, 1068-69, (3d Cir. 1995).

In this matter Anthony Crane filed its Motion to Stay Pending Arbitration on July 8, 1998 (Plaintiff's Complaint was filed on May 20, 1998). Upon review of all pleadings and exhibits, the court finds that "under the totality of circumstances herein...that Defendant has not waived arbitration." See *Nabisco, Inc. v. Michael A. Simmonds, Inc.* 1993 WL 277229 \*2 (D.V.I.).

## II. Separate Claims Against HOVIC/Amerada Hess

Plaintiff argues that her separate claims against HOVIC-Amerada Hess are in any event not subject to arbitration [citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927, 939 (1983)]. No party has maintained otherwise, and nothing in *Cone Memorial Hospital* provides any impediment to implementation of arbitration involving Plaintiff and Anthony Crane. See: *C. Itoh & Co. (America), Inc. v. Jordan International Co.*, 552 F.2d 1228, 1231-32 (7<sup>th</sup> Cir. 1977).

III. The Arbitration Agreement Contains Provisions that Are Contrary to Public Policy

Plaintiff contends that the Arbitration Agreement contains a shortened period of limitations and a cost allocation clause that render such agreement unenforceable. Both such issues were previously considered by this Court. See *Guadalupe* at fn. 1, p. 4. Further, Anthony Crane has not asserted any period of limitation in opposition to arbitration - but rather sought to compel arbitration and accordingly that issue is moot.

Paragraph 15 of the Agreement provides that:

The losing party shall bear the costs of the arbitrator's fees and expenses. The Company shall advance the arbitrator fees and expenses and, if the Company is successful in the arbitration, the EMPLOYEE agrees to reimburse the Company for the arbitrator's fees and expenses. Other than the arbitrator's fees and expenses, each party shall bear its own costs and expenses including attorney's fees.

In *Goodman v. ESPE America, Inc.* 2001 WL 64749 \*3, the Court considered a "loser pays" clause of an agreement to arbitrate. The Court found that such provision was enforceable and did not deny Plaintiff an effective and accessible forum. *Id.* \*4. The Court cited *inter alia*: *Williams v. Cigna Fin. Advisors, Inc.* 197 F.3d 752, 763-64 (5<sup>th</sup> Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1<sup>st</sup> Cir. 1999) [refusing to invalidate arbitration agreement with fee-splitting provision

because fees not yet levied and judicial review available; and noting that arbitration often more affordable for Plaintiffs than litigation); *Arakawa v. Japan Network Group*, 56 F.Supp. 2d, 349, 354-55 (S.D. N.Y. 1999).

In *Goodman* the Court also considered *Green Tree Fin. Corp. v. Randolph*, 121 S.Ct. 513, 522-23 wherein the Supreme Court held that an arbitration agreement that is silent as to who pays arbitration costs is still enforceable despite the risk that it may subject Plaintiff to extensive costs. The Court's reasoning in *Goodman* is adopted herein.

Upon consideration of the above, it is hereby;

**ORDERED** that Anthony Crane's Motion to Stay proceedings pending arbitration and to compel arbitration are GRANTED as to Defendant Anthony Crane (only), and Plaintiff and Anthony Crane shall cooperate in commencement of arbitration.

ENTER:

Dated: March 20, 2001

\_\_\_\_\_/s/\_\_\_\_\_  
JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

ATTEST:  
WILFREDO MORALES  
Clerk of Court

By: \_\_\_\_\_ Deputy Clerk